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In the Matter of A Criminal Investigation 7th District Court No. CS-1 v. : Brief of Respondent

Utah Supreme Court

Stephen B. Nebeker; John A. Adams; Ray, Quinney & Nebeker; F. Robert Reeder; Francis M. Wikstrom; Parsons, Behle & Latimer; Donald B. Holbrook; Elizabeth M. Haslam; George W. Pratt; Jones, Waldo, Holbrook & McDonough; Attorneys for Respondents.
David L. Wilkinson; Attorney General; Paul M. Warner; Robert N. Parrish; Assistant Attorneys General; Attorneys for Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF A CRIMINAL INVESTIGATION,	)	
	)	Case No. 20268
7th District Court No. CS-1	)	

BRIEF OF RESPONDENT EMERY MINING CORPORATION

APPEAL FROM A FINAL ORDER OF THE SEVENTH JUDICIAL DISTRICT COURT, HONORABLE BOYD BUNNELL, JUDGE, DISMISSING THE CRIMINAL INVESTIGATION IN THIS MATTER AND RULING THE SUBPOENA POWERS ACT UNCONSTITUTIONAL

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2. Respondent Emery Mining Corporation, represented by F. Robert Reeder and Francis M. Wikstrom of Parsons, Behle & Latimer, 185 South State Street, Suite 700, Salt Lake City, Utah 84147.

3. Respondents Michael C. Thompson, Bruce A. Conklin, Michael Ziemski, Patricia Thompson Bowman, Mike Thompson & Associates, Guardex, Alarmex, and Vanguard, Inc., represented by Max D. Wheeler and Rodney R. Parker of Snow, Christensen & Martineau, 10 Exchange Place, 11th Floor, Salt Lake City, Utah 84110.

4. Respondents Carl Stott, Orrin Colby, Jr., and Norm Maxfield, employees of Utah Power & Light Company, represented by Donald B. Holbrook and Elizabeth M. Haslam of Jones, Waldo, Holbrook & McDonough, 1500 First Interstate Place, 170 South Main Street, Salt Lake City, Utah 84101.

5. Respondent Utah Power & Light Company, represented by Stephen B. Nebeker and John A. Adams of Ray, Quinney & Nebeker, 400 Deseret Building, 79 South Main Street, Salt Lake City, Utah 84145-3850.

6. Respondent L. Brent Fletcher, represented by Sumner J. Hatch, of Hatch & McCaughey, 72 East 400 South, Suite 330, Salt Lake City, Utah 84110.

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STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Does the Subpoena Powers Act violate the due process clause of the Utah Constitution by granting to prosecutors the unbridled power to subpoena witnesses and conduct secret interrogations without establishing any standards to protect against abuse?

2. Does the Subpoena Powers Act, by creating an investigative procedure with all of the powers of the grand jury and none of the protections, violate individual constitutional rights, including the right to be warned against incriminating oneself, the right to be advised of the nature and scope of the investigation and the right to be informed that counsel may be present during questioning?.

3. Does the Subpoena Powers Act, by granting unbridled discretion to the prosecutor to conduct grand jury type proceedings in secret, violate the constitutional requirement that there be a separation of powers among the branches of government?

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional and statutory provisions relied on by respondent Emery Mining Corporation are set forth in Appendix "A" hereto.

STATEMENT OF THE CASE

This appeal is taken from a final Order of the Seventh Judicial District Court of Emery County dismissing a criminal

investigation and declaring unconstitutional the Subpoena Powers Act, Utah Code Ann. § 77-22-1 et seq. (1982) (sometimes referred to hereinafter as the "Act" or the "Subpoena Powers Act".). (R. at 734) (A copy of Judge Boyd Bunnell's decision is attached hereto as Appendix "B".) The district court's decision came in response to respondents' constitutional challenges to the Subpoena Powers Act and the actions of the Attorney General under authority of that Act.

STATEMENT OF THE FACTS

During its 1980 Budget Session, the Utah State Legislature re-codified Utah's criminal procedure statutes. As part of that re-codification, the Legislature amended the Subpoena Powers Act so as to virtually eliminate judicial control over a prosecutor's use of the courts' subpoena power. (Tr. of Legislative Debates, H.B. No. 32, Jan. 19, 1980 at pp. 5-6). (R. at 318). Under the amended Act, a prosecutor need no longer present a court with good cause for the issuance of each subpoena. Rather, a single good cause showing, if approved by the court, entitles a prosecutor to conduct an investigation during which he may issue subpoenas and take testimony in secret, both without judicial supervision.

On January 26, 1983, the Utah Attorney General's Office initiated such an investigation upon approval of the Seventh District Court for Emery County. (R. at 8). The court also granted the Attorney General's request that the investiga-

tion be subject to a secrecy order. (R. at 3). The investigation was authorized on the basis of an affidavit submitted by Wayne L. Wickizer, an investigator for the Attorney General's Office. The affidavit, consisting primarily of hearsay allegations, asserted that UP&L and Emery Mining officials had engaged in misconduct during the period from September 14, 1981 through March 19, 1982. (R. at 5) (Due to a continuting secrecy Order, a copy of the affidavit is not attached hereto, but appears separately as Appendix "C").

The Attorney General's Office began issuing subpoenas in the name of the Seventh District Court to various individuals, including non-targeted third parties. (Appellant's Brief at pp. 5-6). Because of the secrecy order and the Attorney General's refusal to identify those served, it is still unknown exactly to whom and for what purpose most of the subpoenas were served. (R. at 745). Each of the respondents to this appeal was served with a subpoena and subsequently challenged the enforceability thereof. (R. at 9, 62-135, 212, 220-232, 255-339, 607, 633-651).

Emery Mining, one of several respondents herein, is a closely held corporation which operates UP&L's coal mining properties as an independent contractor. The subpoena duces tecum served on Emery Mining, dated May 16, 1984, was directed to the "custodian of records" and commanded production of:

> records which identify all officers, directors, consultants and employees (both union and non-union, professional and mining) of

> Emery Mining for the period 1979 to the present. Such shall include, but not be limited to, names, addresses, telephone numbers, dates of employment and employee numbers, if known.

(A copy of the subpoena is attached as Appendix "D".) The subpoena specifically stated that it was issued by order of the district court and that failure to obey the subpoena would result in punishment for contempt of court. (R. at 651-52). Emery Mining requested, but never received, information about the nature of the investigation and whether its officers or owners were targets of the investigation. (R. at 640).

Respondents UP&L, Maxfield, Stott and Colby were the first to challenge to Attorney General's subpoenas through motions to quash. (R. at 57, 62). During a hearing on the motions held on May 30, 1984, the Seventh District Court voiced concern about the constitutionality of the Act, particularly with respect to the Act's lack of procedural safeguards. (Tr. of Hearing May 30, 1984 at pp. 43-44, 68). Notwithstanding those reservations, the district court denied the motions to quash, but imposed conditions on the prosecutors use of the subpoena power. These conditions required that subpoenaed individuals be warned whether they were targets of an investigation, informed of their right to counsel and advised of the nature and scope of the investigation. Id.

Shortly thereafter, respondents UP&L, Maxfield, Colby and Stott filed motions to reconsider. (R. at 255). At about this time, respondents Fletcher, Thompson, Ziemski and Conklin,

who had already been charged criminally, filed motions seeking access to certain information developed during the investigation, and joined the motions to reconsider. (R. at 383-86).

In response to this second attack on the Act's constitutionality, the Attorney General's Office withdrew all outstanding subpoenas with the exception of the yet unchallenged subpoena directed to Emery Mining. (R. at 381-82). The Attorney General then argued that since the subpoenas had been withdrawn, the constitutional challenges to the Act were moot. (Tr. of Hearing, Sept. 12, 1984 at p. 87). Apparently the Attorney General opened a new investigation in Salt Lake County at about this time. (R. at 382). From the record it does not appear that the Third District Court knew or had any way of knowing about the constitutional challenges leveled at the Act, or about the restrictions imposed by Judge Bunnell on the Attorney General's use of the subpoena power.

On August 21, 1984, Emery Mining joined those challenging the Act by moving to quash its subpoena. Following a hearing held on September 12, 1984, the Seventh District Court quashed the subpoena served on Emery Mining and allowed those respondents charged criminally in the Fifth Circuit Court to examine the Attorney General's "good cause" affidavit. (Tr. of Hearing, Sept. 12, 1984 at p. 123). Several days later, the court issued a memorandum opinion finding that the Attorney General's Office had engaged in a course of unrestrained abuse

as a result of the Act's lack of standards and declaring the Act unconstitutionally vague. (R. at 734). Based on its ruling, the court dismissed the criminal investigation and the Attorney General filed this appeal.

Respondents filed motions with this Court seeking to supplement the record on appeal by including for in camera review all subpoenas issued by the Attorney General in the course of the criminal investigation. The Attorney General strenuously resisted these motions and this Court took the matter under advisement pending receipt of the parties' briefs on the merits. The Attorney General admits in his brief, however, that numerous subpoenas were served on third parties. (Appellant's Brief at pp. 5-6). Respondents, as well as this Court, are presently without means to review the scope of those subpoenas.

SUMMARY OF THE ARGUMENT

An important aspect of the due process doctrine of vagueness is that a legislature must establish minimum guidelines to govern law enforcement agencies in their administration of criminal statutes. Few governmental powers demand closer scrutiny and stricter controls than the power of compulsory process, especially where coupled with the opportunity for secret interrogations and the power to criminally charge. Yet the Subpoena Powers Act contains virtually no standards to guide prosecutors in their exercise of these vast powers. In

addition, the Act removes the court from the subpoena and secret interrogation process, thus severely restricting the capability for judicial supervision over a prosecutor's use of these powers.

The lack of standards to guide prosecutors invites abuse; the removal of judicial supervision allows abuses to occur. The power to conduct entire investigations, including secret interrogations, results in the potential for undetectable prosecutorial abuse.

Examples of the known abusive conduct engaged in under the Act by the Attorney General in the present case include issuing subpoenas which exceeded the scope of the investigation, conducting overlapping investigations and forum shopping. Under the Act, prosecutors frustrated witness' rights to challenge subpoenas, precluded the authorizing court from reviewing subpoenas issued in its name and used subpoenas to gather evidence after charges had been filed. Evidence obtained pursuant to the investigative power was improperly utilized in civil proceedings by prosecutors acting in both civil and criminal proceedings. On the other hand, criminal defendants were denied access to evidence necessary for the preparation of their defenses and subpoenaed witnesses were told not to discuss their testimony with criminal defendants or their counsel.

The Subpoena Powers Act creates a "one-man grand jury" by vesting in a prosecutor the power to subpoena witnesses, grant immunity and act in secret. The Act grants to the prosecutor all of the powers of a grand jury, but provides for none of the safeguards. The Act eliminates the presence of an independent arbiter, while neither on its face nor in its application does the Act provide the mandatory procedural protections to which subpoenaed individuals are entitled under Article I, Section 12 of the Utah Constitution and this Court's decision in State v. Ruggeri, infra. These protections include the right to be warned against self-incrimination, the right to be advised of the nature and scope of the investigation and the right to the effective assistance of counsel, particularily during questioning.

Finally, the Act allows an unrestricted exercise of the judicial subpoena power by an executive officer in violation of the separation of powers doctrine.

ARGUMENT

I.

THE SUBPOENA POWERS ACT VIOLATES THE DUE PROCESS CLAUSE OF THE UTAH CONSTITUTION.

A. Due Process Requires Statutes to Contain Appropriate Standards to Guide Law Enforcement Personnel.

The Utah Constitution, as well as the United States Constitution, declare that "No person shall be deprived of life, liberty or property without due process of law." Utah

Const. art. I, § 7; U.S. Const. amend. 5. The concept of due process includes the requirement that governmental entities charged with enforcing the law be guided in their actions by a set of reasonable standards. The United States Supreme Court recently emphasized that fact in Kolender v. Lawson, 461 U.S. 352, 75 L.Ed. 2d 903 (1983), wherein it stated:

> Although the [vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine is not actual notice, but the other principle element of the doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement. (citation omitted) Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilictions.

461 U.S. at _____, 75 L.Ed.2d at 909, quoting Smith v. Goguen, 415 U.S. 566, 574-75 (1974) (Emphasis added).

The Subpoena Powers Act fails to provide the minimal standards necessary to guide prosecutors in their use of powers granted under the Act. The 1980 amendment to the Act eliminated the only judicial restrictions on a prosecutor's use of these powers. First, the amendment eliminated court approval of the issuance of subpoenas and vested absolute control in the prosecutor. Under the original Act as adopted in 1971, subpoenas were issued only "upon application and approval of the district court for good cause shown, ..." Utah Code Ann. § 77-45-20 (1953). Under the Act as amended, a court, in whose

name and under whose authority the subpoenas are issued, is removed from the subpoena process once a criminal investigation is authorized.

Second, the 1980 amendment eliminated the court's ability to supervise the taking of testimony in secret. The original version of the Act provided that upon written application by a prosecutor, the district court could "order that interrogation of any witness shall be before a closed court; that such proceeding be secret; and that the record of such testimony be kept secret unless and until the court for good cause otherwise orders." Id. (Emphasis added.) The amended Act allows the prosecutor to take testimony in secret without the supervision and protection of the court. Utah Code Ann. § 77-22-2(3) (1982).

Unless challenged by a recipient of a subpoena, the only restriction on a prosecutor's use of the subpoena power is his own determination of what may be "relevant." Utah Code Ann. § 77-22-2(1) (1953). Because of the elimination of judicial supervision, a subpoenaed witness' rights are protected only by the prosecutor's conscience. Due to its lack of standards to guide prosecutorial conduct, the Act is susceptible to a wide variety of potential abuses. The record in this case demonstrates that many of the potential abuses actually occurred.

B. The Act Does Not Include Any Means of Determining Whether a Prosecutor is Exceeding the Scope of the Authorized Investigation.

1. Once authorized, an investigation is subject only to the prosecutor's determination of relevance.

Once a district court has granted a prosecutor's application to conduct an investigation under the Act, the court is removed from the picture. Since the individual subpoenas are not approved by the court in advance nor returned and filed after service, the court has no way of knowing whether the subpoenas bear any relevance to the purpose and scope of the authorized investigation. The only limitation on a prosecutor is his own discretion as to what may be relevant. The Act allows a prosecutor to intrude into the private affairs of every citizen with no limitations save the prosecutor's conscience.

In the present case, certain of the challenged subpoenas duces tecum indicate the manner in which the Attorney General exceeded the authorized scope of the investigation.

(a) The Emery Mining Subpoena. The subpoena served on Emery Mining commanded its custodian of records to produce:

> records which identify all officers, directors, consultants and employees (both union and non-union, professional and mining) of Emery Mining for the period 1979 to present. Such shall include, but not be limited to, names, addresses, telephone numbers, dates of employment and employee numbers, if known.

(R. at 641; See Appendix "D" hereto). This subpoena exceeded the scope of the investigation authorized by the court in two ways. First, the time period for which the information was requested grossly exceeded the time period targeted by the Attorney General in its application to conduct the investigation. Second, the subpoena demands production of information with respect to all employees of Emery Mining. This includes everyone from the lowest custodians and miner's helpers to the President of the company. It also includes thousands of rank and file miners who worked during that five-year period. This request is well outside the scope of the investigation authorized by the court.

(b) The Colby and Stott subpoenas requesting information relating to uranium properties. The Attorney General served subpoenas on respondents Colby and Stott demanding detailed information concerning UP&L's dealings in uranium properties. (R. at 171, 173). Judge Bunnell recognized the overbreadth of the subpoenas, stating:

> A previous subpoena issued by the Attorney General's office attempted to get into Utah Power and Light Company's dealings in uranium mining, when in fact the original Good Cause Affidavit mentioned no indication of any criminal dealings in this area.

(Memorandum Decision Relative to Constitutionality at p.2) (R. at 735).

(c) Subpoena to Newell Johnson, CPA. A third example of the abuse which resulted under the Act is reflected

by the subpoena served on respondent Mike Thompson's accounting firm ordering the production of the following:

> [A]ll books, records, papers of any kind relating to Mike Thompson and Associates, Guardex, Alarmex, Vanguard, Mike Thompson, individually; Mike Ziemski, individually; Bruce Conklin, individually; Patsy Bowman, individually; and all other individuals and/or entities associated therewith.

(R. at 223) (Emphasis added). This subpoena is so broad it would have commanded the production of the personal records of Thompson's attorney if he had employed the same accounting firm. (Tr. of Hearing, Sept. 12, 1984 at p. 47).

These three examples came to the district court's attention only because they were challenged by the recipients. Due to the secrecy Order and the Attorney General's resistance to filing all issued subpoenas, the full extent of prosecutorial abuse in this investigation is unknown. The Attorney General's reluctance to allow this Court to review the unchallenged subpoenas prompts the inference that they are similarly abusive. This conclusion is not particularly surprising in light of the fact that at least some of the subpoenas appear to have been drafted by the investigator, Wayne Wickizer, rather than by attorneys in the Attorney General's Office. (See Tr. of Darcie White depo., p. 4).

2. Due to the Generic Nature of the Investigation Authorized under the Act, Overlapping Investigations could be Opened in Separate Counties.

The Act authorizes a prosecutor to conduct an investigation by subpoenaing witnesses and conducting secret examina-

tions anywhere within his jurisdiction which, in the case of the Attorney General, is statewide. Thus, the Attorney General may, as he did here, receive authorization to conduct an investigation from one court and proceed to investigate activity throughout the entire state. If the prosecutor is challenged in the authorizing district court, he can, under the veil of secrecy, do as he has done here and simply move to a new district court, obtain identical authority to conduct the same investigation, and continue with the investigation until challenged again. The significance of this problem is demonstrated in the present case where the Seventh District Court was only able to see the full pattern of prosecutorial abuse as a result of cumulative challenges over a period of several months.

Under the Act as adopted in 1971, each subpoena was authorized and issued as an isolated and independent occurrence. Each subpoena was justified on the basis of its own showing of good cause. For this reason, there was little likelihood of overlapping requests before different courts. Similarly, there was no need for a reviewing court to look beyond the subpoena and its good cause showing to determine whether it was abusive.

The problem of overlapping investigations is exemplified by the Attorney General's actions in the present case. In response to the motions to quash and constitutional challenges

leveled at the Act in the Seventh District Court, the Attorney General's Office withdrew the subpoenas issued in the name of that court and argued that the challenges to the subpoena power were thereby rendered moot. Simultaneously, the Attorney General apparently opened an identical investigation in Salt Lake County. Due to the secrecy Order in place, the Salt Lake County District Court had no knowledge, and no means of obtaining knowledge, of the events which had transpired in the Seventh District Court.

C. The Secrecy Provision of the Act Restricts the Ability of the Court to Review the Use of its Subpoena Power and Prevents the Effective Assistance of Counsel.

1. Unless challenged, the subpoenas are never reviewed by the court.

The Act contains no requirement that subpoenas issued by a prosecutor be submitted to a court for review prior to service or that the subpoenas be returned and filed with the court once served. Unless challenged, the court has no way of knowing what is being done under its name and authority. Even when a particular subpoena is challenged, the court is unable to see how it fits into the overall pattern of the investigation.

By way of example, the Attorney General has strenuously resisted respondents' requests that the other subpoenas issued during the investigation be filed with the court for an in camera review. Judge Bunnell was never given the opportunity to inspect the other subpoenas and later ruled that he had

no authority under the Act to require the Attorney General to present the court's own subpoenas for review. (See Appendix "E" attached hereto). As of the present, the other subpoenas are not part of this record although the Attorney General has described some of them in some detail in his brief. (Brief of Appel- lant at pp. 5-6).

2. The secrecy provision of the Act increases the danger of inconsistent rulings by courts.

As discussed above, the Act does not protect against overlapping investigations. Because of the secrecy provisions of the Act, it is entirely possible that two separate district courts could issue contradictory rulings on the interpretation or validity of certain subpoenas or practices and never be aware of the other's ruling. This ability to proceed in several jurisdictions also infringes on the right of appeal to this Court. Utah Const. art. VIII, § 9.

For example, on May 30, 1984, in response to motions to quash filed by respondents UP&L, Maxfield, Colby and Stott, the Seventh District Court expressed substantial reservations about the Act's constitutionality and upheld the Act only by reading into it certain procedural safeguards. (Tr. of Hearing, May 30, 1984 at p. 68). When the Attorney General opened a new investigative proceeding in Salt Lake County later that year, there was no way for the Third District Court to know of Judge Bunnell's ruling.

3. The Act allows prosecutorial "forum shopping."

Although the ability of the courts to review the use of their subpoenas is limited under the Act to those occasions where particular subpoenas are challenged, the Attorney General takes the position that he may divest the courts of even that limited power of review. Nothing in the Act precludes a prosecutor from withdrawing a subpoena once it is challenged and moving the investigation to a different district court. Likewise, if upon challenge a court imposes conditions on the exercise of the subpoena power, the prosecutor can simply move to another county, open an investigation and proceed anew. The new court would be unaware of either the challenge or the adverse ruling because of the secrecy provisions of the Act. Within the State of Utah, the Attorney General has a potential of 29 different courts to which he can turn in hopes of obtaining the desired ruling. This significantly diminishes the "opportunity to challenge" that the Attorney General argues provides the necessary review and protection.

The Attorney General barely survived the first round of constitutional challenges by respondents UP&L, Maxfield, Colby and Stott. The Court expressed reservations about the Act's constitutionality and imposed procedural restrictions on the Attorney General's exercise of the subpoena power. When faced with a renewed and expanded attack, the State withdrew its subpoenas and claimed that any constitutional challenges to

the Act were moot. The Attorney General hoped to remove jurisdiction from the judge who had already expressed grave concerns about the Act's constitutionality. Then the Attorney General opened a new, presumably identical, investigation in Salt Lake County. (R. at 380-81).

4. The secrecy provision of the Act frustrates the ability to effectively attack abusive conduct on the part of prosecutors.

The secrecy provision of the Act and the lack of prior judicial review minimizes the likelihood that abuses of the subpoena power will be detected or effectively challenged. Subpoenas served on third parties, such as financial institutions and record custodians, are kept secret. Even though the subpoenas may exceed the scope of the investigation or seek privileged information, there is little likelihood of challenge since the third parties have no incentive to do so. As the United States Supreme Court recently noted in a case involving an IRS summons, a third party who is not the target of the summons "might have little incentive to oppose enforcement vigorously." Tiffany Fine Arts, Inc. v. United States, ___ U.S. ___, 53 U.S.L.W. 4078, 4080 (1985). The Court went on to state that in a situation where the IRS is not confronted by an adversary, it "could use its summons power to engage in 'fishing expeditions' that might unnecessarily trample upon taxpayer privacy." Id.

The Attorney General's service of subpoenas upon non-target, third parties under the Act gives rise to the same concerns and abuses. While Congress has statutorily created protections against the IRS' abuse of its summons power by either allowing the targeted party notice and an opportunity to challenge the summons or requiring that a court exert a restraining influence on the IRS, 26 U.S.C. § 7209, the Subpoena Powers Act provides no opportunity to a targeted individual to challenge third party subpoenas or, for that matter, to obtain notice of subpoenas served on third parties.

The Attorney General admits that as part of its investigation it has served numerous subpoenas on third parties who are not targets of the investigation. (Brief of Appellant at pp. 5-6). Since none of these third parties have come forward to challenge the subpoenas, neither this Court nor respondents have any way of knowing to whom the subpoenas were issued or what information was sought or received as a result. The secrecy provisions, both on their face and as applied, allow an investigation to proceed in secret as well as allowing the interrogation of witnesses in secret. The secrecy provisions also allow the prosecutor to keep from counsel for any witness any facts about the nature and scope of the investigation and the identity of its targets. In other words, a witness may be deprived of the effective assistance of counsel.

D. The Act Allows for Continued Abuse Once Criminal Charges Have Been Filed.

1. A Prosecutor may continue to gather evidence by means of subpoenas after criminal charges have been filed.

Utah's Subpoena Powers Act has somtimes been referred to as the "mini-grand jury act" because of the powers it confers on the prosecutor. KUTV, Inc. v. Conder, 635 P.2d 412 (Utah 1981). It is highly improper for a prosecutor in a grand jury setting to continue to gather evidence by means of a grand jury subpoena once an individual is charged. United States v. Doss, 563 F.2d 265, 275 (6th Cir. 1977); See also United States v. Santucci , 504 F.Supp. 1072, 1075 (N.D. Ill. 1980). Nevertheless, in the present case the Attorney General continued to use subpoenas to gather evidence against several of the respondents even after criminal charges had been filed against them. For example, the subpoena to Mike Thompson's CPA, discussed above, was issued on May 14, 1984, several weeks after the complaint was filed in Fifth Circuit Court.

2. The secrecy provisions of the Act allow a prosecutor to withhold evidence which would otherwise be discoverable by a criminal defendant.

Once an individual is charged with a crime, he is entitled to discover certain information necessary to the preparation of his defense. Utah Code Ann. § 77-35-16(5) (1953). Typically this would include prior statements of witnesses, People v. Shaw, 646 P.2d 375, 381 (Colo. 1982), and affidavits filed by the State. People v. Mendez, 28 App. Div. 2d 727, 281

N.Y.S. 2d 608 (1967). Because of the Act's secrecy provisions, however, a prosecutor is able to withhold such information from a criminal defendant.

For example, after charges had been filed against several of the respondents herein, the Attorney General refused to make available to them the Good Cause Affidavit upon which the criminal investigation was based. The Attorney General disclosed the Affidavit only when ordered to do so by the Seventh District Court.

3. The Attorney General used the secrecy provisions of the Act to prevent witnesses from talking to criminal defendants or their counsel.

In the course of their secret depositions of witnesses, members of the Attorney General's Office told witnesses that they were prohibited under the secrecy order from speaking to anyone about the questions asked and answers given. For example, in the secret deposition of Darcie White, the following statements were made:

> [Mr. Olsen] Mr. White, let me just remind you of something that Steve may well have talked to you about, but for purposes of making sure that we're clear on this, the proceedings here are pursuant to an investigative subpoena and are under a secrecy order. I would just remind you that the proceedings here, the questions, etc., are secret. They certainly may be discussed with Mr. Nebeker but not with others. The other question I have is--well, let me ask you if you understand that.

MR. NEBEKER: Let me ask you on what authority you're telling him that he can't discuss this with anyone

MR. OLSEN: Pursuant to the secrecy order.

* * *

MR. NEBEKER: Are you saying that this order says that these people cannot talk to anyone? Is that how you're interpreting this?

MR. OLSEN: Well, I think with the exception of the attorney, that is correct. I don't know what the--

* * *

MS. DALLIMORE: Well, Steve, I think, at a minimum, it would be better for everyone concerned if a lot of people didn't do a lot of talking to each other about these proceedings and, specifically, of course, if Mr. Fletcher called you on the phone, don't you think it would be more appropriate that it not be discussed?

(Tr. of Darcie White depo. at pp. 161-64). Although Mr. White's counsel took exception to the Attorney General's admonition, the prosecutors remained adamant. Id. at 165. Unrepresented witnesses may have been examined on the most irrelevant and even privileged matters and not come forward to disclose the same because of the prosecutor's admonition. This conduct is improper and abusive in that it tends to "lock up" a witness' testimony and prevents counsel for a criminal defendant from effectively preparing a defense. It also reduces the likelihood that abusive practices of the prosecutor will be brought to light and challenged.

E. The Act Contains no Standards to Prohibit Improper Use of Evidence Gathered in Criminal Investigations.

Because of the unrestrained control of the prosecutor over use of the subpoena power and the cloak of secrecy which envelops the investigation, the authorizing court has no means of ascertaining how the gathered evidence is actually being used. Since the court has no means of knowing to whom subpoenas have been served, it has no way of tracking either the source of evidence or creating a record of the evidence itself. In addition, it is impossible to determine whether the subpoena power in the criminal investigation is also being used to gather evidence for use in civil or administrative proceedings. The seriousness of that problem is even more acute where, as in this case, the same attorneys for the State are involved in the criminal, civil, and administrative aspects of a case.

The United States Supreme Court recently condemned the use of grand jury subpoenas to obtain evidence for use in civil actions in the case of United States v. Sells Engineering, Inc., ___ U.S. ___, 77 L.Ed.2d 743, 757 (1983), stating:

> [B]ecause the Government takes an active part in the activities of the grand jury, disclosure to government attorneys for civil use poses a significant threat to the integrity of the grand jury itself. If prosecutors in a given case knew that their colleagues would be free to use the materials generated by the grand jury for a civil case, they might be tempted to manipulate the grand jury's powerful investigative tools to root out additional evidence useful in the civil suit, or even to start or continue a grand jury inquiry where no criminal

> prosecution seemed likely. Any such use of grand jury proceedings to elicit evidence for use in a civil case is improper per se. (Emphasis added).

The same attorneys from the Attorney General's Office (notably Ms. Dallimore) are involved in three separate, although related proceedings. In addition to its involvement in the criminal investigation, the Attorney General's Office has been involved in a proceeding before the Utah Public Service Commission involving allegations of misconduct on the part of UP&L and Emery Mining. The Attorney General's Office has also been involved in a factually related civil anti-trust case against those parties who have already been charged criminally as a result of this investigation. It is unrealistic to believe that these prosecutors can segregate in their minds evidence obtained in the criminal proceedings from that gathered elsewhere.

F. Other State Subpoena Powers Statutes Provide Standards to Guide Prosecutorial Conduct.

A survey of state statutes for provisions similar to the Utah Subpoena Powers Act reveals that the few states granting investigative subpoena power to prosecutors have done so in a manner which (1) preserves judicial approval or, (2) is not subject to a secrecy provision. No state subpoena power statute was found, other than Utah's, which gives the prosecutor not only unbridled discretion in the use of the subpoena power, but the right to request that the proceedings be held in secret.

The Montana statute requires court issuance of each subpoena upon a showing of cause, much the same as the Utah Act prior to the 1980 Amendment. Mont. Code Ann. § 46-4-301 (1983) provides:

> Whenever the attorney general or a county attorney has a duty to investigate alleged unlawful activity, any Justice of the Supreme Court or District Court Judge of this state may cause subpoenas to be issued commanding the persons to whom they are directed to appear before the attorney general or the county attorney and give testimony and produce such books, records, papers, documents and other objects as may be necessary and proper to the investigation. A subpoena may issue only when it appears upon the affidavit of the attorney general or the county attorney that the administration of justice requires it to be issued. (Emphasis added).

The Montana statute further provides that if a subpoenaed witness does not have funds to obtain counsel, the judge or justice shall appoint counsel for him. Mont. Code Ann. § 46-4-304 (1983).

The Louisiana statute also requires judicial approval of each subpoena. La. Rev. Stat. Ann. Art. 66 (West Supp. 1984) provides:

> Upon written motion of the attorney general or district attorney setting forth reasonable grounds therefor, the court may order the clerk to issue subpoenas directed to the persons named in the motion, ordering them to appear at a time and place designated in the order for questioning by the attorney general or district attorney respectively, concerning any offense under investigation by him. The court may also order the issuance of a subpoena duces tecum. (Emphasis added).

In Utah, a citizen is faced with a subpoena that appears to have been issued by the court when in fact it has been issued by the Attorney General. Arguably, a citizen will be less likely to resist what appears to be a court-authorized subpoena. Under the Louisiana and Montana provisions, what the citizen perceives is indeed the case, i.e., the court has authorized the issuance of the subpoena. In short, the citizen's natural inclination to comply with a court order is justified.

Two other states also have statutes with respect to investigative subpoenas. Iowa Code § 813.2, Rule 5(6) (1979) provides:

> The clerk of the district court, on written application of the prosecuting attorney and the approval of the court, shall issue subpoenas including subpoenas duces tecum for such witnesses as the prosecuting attorney may require in investigating an offense . . . . (Emphasis added).

Under Kan. Stat. Ann. § 22-3101 (1981), after an application has been filed with a district judge requesting authority to conduct an inquisition, "the judge with whom it is filed shall, on the written praecipe of the attorney general, assistant attorney general or county attorney, issue a subpoena for the witnesses named in such praecipe commanding them to appear and testify . . . ." In addition to judicial involvement in the issuance of subpoenas, the Kansas statute, unlike the Utah Act, does not provide that the proceedings may be held in secret.

Only Delaware has an investigative subpoena statute similar to Utah's Act in that the attorney general alone is authorized to issue investigative subpoenas. The Delaware statute does not, however, provide prosecutors with a device whereby interroga- tions can be conducted in secret. See Del. Code Ann. Title 29 § 2508 (1974) (See Appendix "A" hereto).

II.

THE SUBPOENA POWERS ACT IS CONSTITUTIONALLY DEFICIENT IN THAT IT FAILS TO PROTECT FUNDAMENTAL CONSTITUTIONAL RIGHTS.

In KUTV, Inc. v. Conder, supra, 635 P.2d 412 (Utah 1981), this Court declared that the Subpoena Powers Act essentially created a "mini-grand jury" by vesting in prosecutors the power to subpoena witnesses and grant immunity, and the ability to do so in secrecy. A significant distinction between the "mini-grand jury" created by the Subpoena Powers Act and a grand jury convened under the direction and supervision of a district court is that the Subpoena Powers Act vests in the prosecutor virtually all of the powers of the grand jury, but provides none of the procedural protections.

The grand jury is an extension of the court and stands between the prosecutor and the accused or witnesses subpoenaed to appear. United States v. Sells Engineering, Inc., supra, 77 L. Ed.2d at 752 (1983). In other words, the grand jury acts as a buffer between the one charged with the responsibility of prosecuting and the one being prosecuted. The Subpoena Powers Act provides for no such buffer or protection.

Notwithstanding the role of the grand jury as a buffer between the prosecutor and those appearing before it, this Court found it important to provide additional safeguards for witnesses in the grand jury setting. In State v. Ruggeri, 19 Utah 2d 216, 429 P.2d 969 (1967), in an opinion authored by Justice Ellett, concurred in by Justice Tuckett specifically and by Justice Henroid by means of a separate concurring opinion, it was held that when a target of an investigation is subpoenaed before a grand jury he is an "accused" within the meaning of Utah Const. art. I, § 12 and is entitled to the protections guaranteed therein. In Ruggeri, a county commissioner was subpoenaed to appear before a grand jury and compelled to give testimony. The witness was neither informed nor was he aware that he was a target of the investigation. With respect to issues addressed in Ruggeri which are pertinent to this appeal, a majority of the Court agreed that any witness subpoenaed to appear before the grand jury is in custody and is entitled to the custodial interrogation warnings prescribed by Miranda v. Arizona, 384 U.S. 436 (1966). Justice Ellett stated:

> The target of an investigation is an accused within the meaning of the Constitution and when he is detained in any significant way, he may not be interrogated unless he is advised of the charges against him then under consideration. To fail to so warn one so being investigated is to entrap him and to violate his constitutional privilege against self-incrimination.

19 Utah 2d at 223, 429 P.2d at 973.

An accused within the meaning of Utah Const. art. I, § 12 is entitled to be warned of his right against self incrimination, to be informed of the scope of the investigation and to be advised of his right to have counsel present during the interrogation. This includes being informed that if he cannot afford counsel, the court will appoint counsel for him.

The Attorney General acknowledges the absence of these protections both in the literal language and in the application of the Act. The State seems to view itself, however, as the entity responsible for recognizing and protecting these rights. According to an Assistant Attorney General:

> The best that state prosecutors can do, at this point, is to act in the way that seems most fair, and that protects individual constitutional rights as they may appear.

(R. at 146).

In the instant case, respondent Fletcher was entrapped, much like the county commissioner in Ruggeri, into volunteering testimony without having been warned that he was a target of the Attorney General's investigation. Additionally, none of the employees of UP&L were informed whether they were targets of the investigation nor were they advised as to the scope of the investigation although their counsel specificaly requested such information. (Tr. of Darcie White depo. at pp. 3-6).

In sum, the Subpoena Powers Act frees the prosecutor of limitations inherent in the grand jury system and of the restraining influence of the court's presence and allows him to compel testimony in secret with only his conscience to protect individuals' rights.

III.

THE ACT CONTRAVENES THE STATE CONSTITUTIONAL REQUIREMENT THAT THERE BE A SEPARATION OF POWERS BETWEEN THE EXECUTIVE AND JUDICIAL BRANCHES OF GOVERNMENT.

The separation of powers doctrine contained in Article V, Section 1 of the Utah Constitution provides:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the legislative, the executive, and the judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

(Emphasis added).

With regard to the allocation of powers among the branches of state government, this Court has declared:

> The departments are all upon the same plane: are all coordinate branches of the same government; each absolute within its sphere, except as limited or controlled by the Constitution of the State or of the United States. The apportionment of distinct power to one department of itself implies an inhibition against its exercise by either of the other departments.

Kimball v. City of Grantsville, 19 Utah 368, 382-83, 57 P.1, 4 (Utah 1899) (Emphasis added).

As discussed at length above, the Act vests in a prosecutor almost unchecked authority to subpoena witnesses and take testimony in secret. The subpoenas, although issued by the Attorney General, bear the name of the district court and indicate that failure to comply will result in being found in contempt of court. Once the investigation is approved, the district court is virtually powerless to supervise or review the issuance of the subpoenas, unless a particular subpoena is challenged. Likewise, the court has no control over the interrogation of witnesses conducted in secret.

Under the Act, a prosecutor is transformed into a one-man grand jury. KUTV, Inc. v. Conder, supra. It is well accepted, however, that the grand jury is merely an extension of the court; that is, part of the judicial branch of government. In re Moe, 617 P.2d 1222, 1224 (Hawaii 1980). A prosecutor, on the other hand, is a member of the executive branch. When acting as a one-man grand jury, the prosecutor impermissibly wears the hats of two branches.

In State v. Gallion, 572 P.2d 683 (Utah 1977), this Court declared it a violation of the separation of powers doctrine to grant the Attorney General power to add or delete substances covered by the Utah Controlled Substance Act. The Court noted that such a grant of power placed the Attorney General, a member of the executive branch, in a position to carry out functions properly vested in the legislative branch. The Court stated:

> [T]he person, who is to be alert to possible constitutional infirmities, is participating in the legislative process by determining an essential element of a crime and the penalty. . . .
>
> If Article V, Section 1, has any purpose it is to prohibit the concentration of legislative and executive powers in one person.

Id. at 686 (Emphasis in original). The same could be said with respect to concentrating judicial and executive powers in one person, as is the case under the Subpoena Powers Act.

Where a court authorizes, directs and controls the use of its subpoena power, there exists no violation of the separation of powers doctrine. Ashton-Jenkins Co. v. Bramel, 56 Utah 587, 192 P.375 (Utah 1920). Under the original Act, the district court acted as a check on the prosecutor's powers. Under the amended Act, the prosecutor's conscience replaces the court. This vesting of power in the prosecutor constitutes nothing less than a grant of judicial power to an executive officer and is directly in conflict with the separation of powers doctrine.

IV.

THE SUBPOENA POWERS ACT IS NOT ENTITLED TO A PRESUMPTION OF CONSTITUTIONALITY.

Courts generally accord legislative enactments a presumption of validity. Murray City v. Hall, 663 P.2d 1314 (Utah 1983). However, the presumption is rebuttable and a court is obligated to strike down legislative acts where "the interests of justice in the particular case before it require doing so

because the act is clearly in conflict with the higher laws set forth in the Constitution." Zamora v. Draper, 635 P.2d 78, 80 (Utah 1981). Where a statute encroaches on fundamental personal liberties, as is the case herein, the presumption of validity is more easily overcome.

The legislative history behind the original Act indicates that considerable emphasis was placed on the need for judicial supervision over the subpoena power. Representative Fisher, the sponsor of the original Act, proposed an amendment to the Bill stating:

> It is suggested that the subpoena power be limited to approval of the district court and so on line four, after the word "right" "have the right", insert the word "upon application and approval of the district court for good cause shown."

(Tr. of House Debates on H.B. No. 121, March 10, 1971, p.5) (R. at 292). Representative Florence also expressed concern about the potential for abuse absent court supervision:

> I've had it expressed to my by a couple of county attorneys that they are in favor of this amendment not so much that they are in fear of abuse by their own office, but it is subject to possible abuse. In a sense, it involves a possible dragnet situation if we allowed complete discretion with the prosecuting attorney to subpoena any person that he may want even though that individual would have to be given immunity prior to testifying to any criminal implication. It is still something which delves upon an individual's personal freedom and right to privacy and there should be some limited area where a person could, in fact, have this reviewable by a judicial body based on probable cause so

> it cannot be a spurious subpoena to investigate into matters which totally are without the realm of some criminal activity.

(Tr. of House Debates on H.B. No. 121, March 10, 1971, p.7) (R. at 294). Representative Fisher clearly indicated that advance judicial approval was necessary for the issuance of subpoenas, stating:

> Representative Mecham will remember that his Ombudsman Bill was declared unconstitutional because it gave no protection to the subpoena power that the committee obtained under the bill that we passed and, for that reason, the court said it was not a constitutional Act; at least in this instance. Now, we have required that these subpoenas be issued the same as would a search warrant of a person's home or search warrant of his car or his person.

(Tr. of House Debates on H.B. No. 121, March 10, 1971, pp. 12-13) (Emphasis added) (R. at 299-300).

The legislative history behind the 1980 amendment does not reveal any reason for the elimination of the judicial protections that had been of such concern to the enacting legislators. The 1980 Legislature apparently thought it was simply recodifying the criminal procedure code. This fact is reflected by statements made by Representative Livingston during debates on the redocification:

> The Chief of Police of Provo . . . called and asked for the status of House Bill 32 and literally pleaded with me for the sake of his local enforcement that House Bill 32 be passed and his comment is not far different from those that I've related to you before from County Attorneys, from judges and others throughout the state who have said "The Bill's not perfect, it's not the way that I

> would write it if I had the total authorship but the need to have this occur is so great and we are so hamstrung right now with the confusion regarding the rules of the game, the rules of procedure that we need this Bill passed." . . . House Bill 32 is a lengthy bill and I apologize to you for the length of that particularity in a budget session . . . . Let me point out that a third of what is before you is already in the Utah Code. It is simply reputting and reenacting it.

(Tr. of Legislative Debates, H.B. 32, Jan. 19, 1980 at p. 2) (Emphasis added) (R. at 315).

Representative Fox expressed concern over the passage of such a massive and important bill during a budget session, as follows:

> I'm a bit concerned about the size of this bill that we have before us in this very busy budget session. It's 161 pages long. There is some very subtle but very significant changes that are being made in our criminal code. I'm concerned that we as busy legislators haven't had the time to read all 161 pages and understand the changes . . . . I think there is no question that we need a revision in our criminal code but I believe that a revision should be done at a time when we as a legislature have enough time to be able to take a solid look at these changes, at what these changes are going to mean.

Id. at 7 (Emphasis added) (R. at 320). The inference is clear that the 1980 Legislature intended only to re-codify the criminal procedure statues, rather than make sweeping substantive changes which were in direct conflict with prior legislative intent.

Not only is the 1980 amendment in conflict with prior legislative purpose, it also contravenes the "One Subject" rule contained in Article VI, Section 22 of the Utah Constitution since substantive changes were made during what was supposedly a re-codification. For these reasons, the presumption of validity generally given to legislative enactments is seriously eroded with respect to the 1980 amendment.

CONCLUSION

The Subpoena Powers Act ignores constitutional safeguards that were designed to protect individuals from abuses which may occur when unbridled power is given to any governmental body. Not only does the Act violate principles of procedural and substantive due process, it also eliminates the checks and balances constitutionally imposed between the executive and the judiciary. The Act replaces the buffer of the independent grand jury with the discretion of the prosecutor and leaves to the conscience of the prosecutor the protection of witness' rights. The Seventh District Court's decision declaring the Act unconstitutional and dismissing the investigation should be affirmed.

RESPECTFULLY SUBMITTED this 25 day of February, 1985.

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CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, postage prepaid, four true and correct copies of the foregoing BRIEF OF RESPONDENT EMERY MINING CORPORATION to the following on this 25th day of February, 1985:

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ADDENDUM

Appendix "A"

U.S. Const. amend. 5:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private peoperty be taken for public use, without just compensation.

Utah Const. art. I. § 7:

> No person shall be deprived of life, liberty or property, without due process of law.

Utah Const. art. I, § 12:

> In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, and to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Utah Const. art. V, § 1:

> The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to

one of these departments, shall exercise any function appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const. art VI, § 22:

> Every bill shall be read by title three separate times in each house except in cases where two-thirds of the house where such bill is pending suspend this requirement. Except general appropriation bills and bills for the codification and general revision of laws, no bill shall be passed containing more than one subject, which shall be clearly expressed in its title. The vote upon the final passage of all bills shall be by yeas and nays and entered upon the respective journals of the house in which the vote occurs. No bill or joint resolution shall be passed except with the assent of the majority of all the members elected to each house of the Legislature.

Utah Code Ann. § 77-45-20 (1953) (the Orignial Act):

> Any matter involving the investigation of a crime, the existence of a crime, or any criminal conspiracy or activity the Attorney General, any district attorney or any county attorney shall have the right, upon application and approval of the district court for good cause shown, to subpoena witnesses, compel their attendance and testimony under oath before any certified court reporter, and require the production of books, papers, documents, records and other tangible items which constitute or may contain evidence which is or may be relevant or material to the investigation in the judgment of the Attorney General, District Attorney or County Attorney.
>
> The subpoena need not disclose the name or names of possible defendants and need only contain notification that the testimony of the witness is sought in aid of a criminal investigation and state the time and place of the examination, which may be conducted anywhere within the jurisdiction of the attorney issuing the subpoena, and inform the party served that he is entitled to be represented by counsel. Witness fees and expenses shall be tendered and paid as in any civil action.
>
> In addition to the forgoing rights and powers to compel attendance and obtain evidence, the Attorney General, any District Attorney, or any County Attorney may make written application to any district court and the

court may order that interrogation of any witness shall be before a closed court; that such proceedings shall be secret; and that the record of such testimony shall be keep secret unless and until the court for good cause otherwise orders. The court shall have the power to exclude from any investigative hearing or proceeding, any and all persons except the attorneys representing the state and members of their staffs, court reporter, and the attorney for the witness.

Utah Code Ann. § 77-22-2 (1982) (the Amended Act):

(1) In any matter involving the investigation of a crime, the existence of a crime or malfeasance in office or any criminal conspriacy or activity, the Attorney General or any county attorney shall have the right, upon application and approval of the district court, for good cause shown, to conduct an investigation in which the prosecutor may subpoena witnesses, compel their attendance and testimony under oath before any certified court reporter, and require the production papers, documents, recordings and any other items which constitute evidence or may be relevant to the investigation in the judgment of the Attorney General or county attorney.

(2) The subpoena need not disclose the names of possible defendants and need only contain notification that the testimony of the witness is sought in aid of criminal investigations and state the time and place of the examination, which may be conducted anywhere within the jurisdiction of the prosecutor using the subpoena, and inform the party served that he is entitled to be represented by counsel. Witness fees and expenses shall be paid as in a civil action.

(3) The Attorney General or any county attorney may make written application to any district court and the court may order the interrogation of any witness shall be held in secret; that such proceedings shall be secret; and that the record of testimony be kept secret unless and until the court for good cause otherwise orders. The court may order excluded from any investigative hearings or proceedings any persons except the attorneys representing the state and members of their staffs, the court reporter and the attorney for the witness.

Del. Code Ann. Title 29 § 2508 (1974):

(a) The Attorney General or any assistant may administer oaths and affirmations to any person, including witnesses, at any time or in any place and may issue process to compel the attendance of persons, witnesses and evidence at the office of the Attorney General or at such other place as designated.

(b) The Attorney General shall transmit to the Prothonotaries of the counties of this State a certified list giving the names and addresses of persons or witnesses subpoenaed under this section, the time occupied in attendance and the distance traveled by them respectively. The list shall be legal proof, and the same costs shall accrue and be paid in the same manner as is provided by law to be paid to witnesses for attendance at the courts of this State.

APPENDIX "B"

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY,
STATE OF UTAH

IN THE MATTER OF A CRIMINAL INVESTIGATION	MEMORANDUM DECISION RELATIVE TO CONSTITUTIONALITY
	CS NO. 1

On September 12, 1984, a hearing was held in this Court pursuant to Notice on Motions submitted by parties who were subject to subpoena under this Criminal Investigation proceeding. The Court ruled from the bench on most Motions and took under advisement the challenge to the constitutionality of the Act (77-22-1 et seq.), authorizing the investigative procedure being used as raised by several of the parties for the first time in their own behalf and by other parties on a Motion to reconsider.

The Court previously considered the constitutional challenge to the Act at a hearing held on May 30, 1984, and the Court ruled at that time that the Court would give the Act the presumption of constitutionality provided that in its application the State Prosecutors comply with the following requirements:

1. Witnesses subpoenaed pursuant to the Act must be informed whether or not they are targets of the investigation;

2. Such witnesses must be informed of the nature of the matter under investigation and the scope of the investigation;

3. Investigations conducted under the authority of the Act must be limited to criminal investigations within the parameters of the initial good cause affidavit.

Since that ruling, the Court has had opportunity to see the manner in which the Act has been applied and is being applied and the way it can be used to violate the personal rights of the citizens of this state.

For instance, the subpoena duces tecum served upon Emery Mining Company commands that Company to produce:

> "records which identify all officers, directors, consultants and employees (both union and non-union, professional and mining) of Emery Mining for the period 1979 to the present. Such shall include, but not be limited to, names addresses, telephone numbers, dates of employment and employee numbers, if known."

Upon challenge, this Court ordered that general subpoena suppressed as being too broad in any investigation of any criminal activity.

A previous subpoena issued by the Attorney General's Office attempted to get into Utah Power and Light Company's dealings in uranium mining, when in fact the original Good Cause Affidavit mentioned no indication of any criminal dealings in this area. The State withdrew this subpoena when challenged in this court.

Another subpoena issued out of this proceeding was directed to a CPA firm and ordered the production of the following:

> "You are commanded to bring with you any and all books, records, papers of any kind relating to Mike Thompson and Associates, Guardex, Alarmex, Vanguard, Mike Thompson, individually; Mike Ziemski, individually; Bruce Conklin, individually; Patsy Bowman, individually; and all other individuals and/or entities associated therewith."

This subpoena was withdrawn by the State upon challenge in this Court.

The deposition of L. Brent Fletcher, taken pursuant to subpoena issued under this investigative proceeding, did not comply with the requisites that this Court feels must be imposed to make the Act constituional in its application in that the witness never was informed that he was a target, nor as to the nature of the investigation and, because of the Secrecy Order, he had no way of knowing whether the matter being inquired into was within the perimeter of the good cause showing. He was allowed, and did have, his attorney present with him during these proceedings.

Some criminal charges have already been filed in Salt Lake County based upon information obtained through this proceeding, and a civil anti-trust case has been filed in Salt Lake County, also as a result of some of the information derived from this investigative proceeding. This investigative proceeding is

still open and being used for whatever purposes the State desires and solely within their discretion under the Act, without limitation as to when a criminal investigation becomes a prosecution or controlling the ultimate use of the findings for civil purposes.

The Act has been abused and is subject to continued abuse under its broad terms and provisions that set no limitations upon the State or any guidelines to the use of their subpoena power. The Court quite agrees with the Utah Supreme Court in its statement given in the case of In Re The Matter of Nelda Boyer, 636 P2d 1085, wherein the Court states as follows:

> "When State action impinges on fundamental rights, due process requires standards which clearly define the scope of permissable conduct so as to avoid unwarranted intrusion on those rights."

This Court has, therefore, concluded that the Act is too vague and does not give proper protection to individual citizens against violation of their constituional right of due process and protection against self-incrimination and allows for an absolute abuse of power without the benefit of judicial review or control once the general subpoena power is granted and finds the Act is unconstitutional.

THEREFORE, the Court does hereby dismiss this Criminal Investigative Proceeding and strikes the Investigative Subpoena Power heretofore granted to the State by this Court.

DATED this 20th day of September, 1984.

BOYD BUNNELL, DISTRICT COURT

MAILING CERTIFICATE

I hereby certify that I mailed true and correct copies of the foregoing MEMORANDUM DECISION RELATIVE TO CONSTITUTIONALITY, by depositing the same in the United States Mail, postage prepaid, to the following:

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PARSONS, BEHLE & LATIMER
185 South State Street, Suite 70
P. O. Box 11898
Salt Lake City, Utah 84147

DATED this 20th day of September, 1984.

Secretary

APPENDIX "C"

Affidavit of Wayne L. Wickizer

(Copies of the affidavit were provided to the Justices and their law clerks under separate cover so as not to violate a continuing secrecy Order.)

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division
STANLEY H. OLSEN
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7627

IN THE SEVENTH JUDICIAL DISTRICT COURT OF EMERY COUNTY

STATE OF UTAH

IN THE MATTER OF A	SUBPOENA DUCES TECUM
CRIMINAL INVESTIGATION	CS NO. 1

THE STATE OF UTAH TO: Custodian of the Records
Emery Mining Company
c/o Francis M. Wikstrom
185 South State
Salt Lake City, Utah
532-1234

You are hereby commanded to set aside all business and excuses and appear at the office of the Attorney General of the State of Utah, 236 State Capitol, Salt Lake City, Utah, at the hour of 9:00 a.m., on Monday, the 25th day of June, 1984, to give testimony in support of a criminal investigation. You are entitled to be represented by legal counsel.

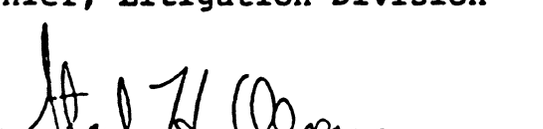
You are also commanded to bring with you any and all books, records, documents, accounts, or papers pertaining to:

Records which identify all officers, directors, consultants and employees (both union and non-union, professional and mining) of Emery Mining for the period 1979 to the present. Such shall include, but not be limited to, names, addresses, telephone numbers, dates of employment and employee numbers, if known.

This Subpoena Duces Tecum is authorized by order of the District Court. Disobedience to this order is punishable by contempt of Court.

Given under my hand this 16th day of May, 1984.

DAVID L. WILKINSON
Attorney General
PAUL M. WARNER
Assistant Attorney General
Chief, Litigation Division

By: 
STANLEY H. OLSEN
Assistant Attorney General
Litigation Division

APPENDIX "E"

IN THE SEVENTH JUDICIAL DISTRICT COURT FOR EMERY COUNTY, STATE OF UTAH

IN THE MATTER OF A CRIMINAL INVESTIGATION	ORDER ON MOTION TO COMPEL PRODUCTION OF DOCUMENTS CS No. 1

The Movants, Karl J. Stott, Norman Maxfield and Orrin T. Colby, Jr., have moved the Court for an order compelling the State of Utah to answer certain interrogatories and to produce certain documents to supplement the record in aid of appeal in this case. This Court has previously declared the Statute that originated this proceeding to be unconstitutional and has in effect dismissed the whole proceeding, and the State of Utah has filed its Notice of Appeal of that decision.

When the Notice of Appeal is filed, the trial court, in general terms, loses jurisdiction to take further action in the case except to take steps to see that the proper record goes to the Appellate Court in accordance with Rule 75(h).

In the order requested, the applicant asks the Court to order the Attorney General's Office to file documents in the nature of the subpoenas that were issued by that office that

are not part of the records of this Court, and would never become a record in this Court unless challenged by the party to whom it was directed.

Since the matters asked for are not part of the record and may never become part of the record in this Court, and since the Court, under the Statutes in question, has no authority to require the filing or production of subpoenas issued by the Attorney General until contested, the Motion must be denied.

The issuance, contents and matters covered, whether within the perimeter of the Investigative Affidavit, are entirely within the discretion of the prosecuting attorneys and are not subject to any judicial control or prior review.

THEREFORE, this Court is of the opinion that it is without authority to order production of the subpoenas requested and is of the opinion that this is a further reason for declaring the Statute unconstitutional.

DATED this ____ day of December, 1984.

BOYD BUNNELL, DISTRICT JUDGE

CERTIFICATE OF MAILING

I hereby certify that I mailed true and correct copies of the foregoing ORDER ON MOTION TO COMPEL PRODUCTION OF DOCUMENTS, by depositing the same in the United States Mail, postage prepaid, to the following:

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Attorney General
Paul M. Warner
Stanley H. Olsen
Suzanne M. Dallimore
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DATED this 7th day of December, 1984.

Maria L. Wilson
SECRETARY